Office-Supreme Court, U.S.
FILED
JUN 9 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 1644

VIRGIL D. DARDI,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Court of Appeals for the Second Circuit has handed down a decision on pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure that (i) is at odds with this Court's decision in *Bowman Dairy Co. v. United States*, 341 U. S. 214 (1951), (ii) ignores general rules of fairness in federal courts and requirements of due process of law under the Fifth Amendment to the United States Constitution, (iii) reverses a liberal trend of pretrial discovery in complex documentary cases by approving a theory of "prepare as you go", and (iv) sets out a vague rule of reversible error that will make it impossible to reverse a case ever in the Second Circuit because of denials of proper discovery and thus is an invitation to flaunt sensible pretrial discovery ..... 31

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The restrictions imposed by the trial court on the cross-examination of the witness Lehrich constituted (i) a denial of the right of cross-examination and thus of due process of law and (ii) an abuse of discretion under the federal rule of scope of cross-examination; the Court of Appeals ignored the law of conspiracy that made the "usual" rule of scope of cross-examination inapplicable and has set a seriously erroneous precedent ..... 53

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IN THE

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OCTOBER TERM, 1963

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VIRGIL D. DARDI,

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—v.—

UNITED STATES OF AMERICA.

## PETITION FOR CERTIORARI

Petitioner Virgil D. Dardi prays that a writ of certiorari be issued to review a judgment which the United States Court of Appeals for the Second Circuit entered on March 17, 1964.

### Opinion Below

The opinion of the Court of Appeals affirming the judgment of conviction is reported at 330 F. 2d 316 and is set out in Appendix A.

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit with respect to which a writ of certiorari is sought was entered on March 17, 1964. A motion for rehearing was denied by the Court of Appeals on April 10, 1964. The time within which to file a petition for the writ was extended to June 9, 1964, by an order of Mr. Justice John M. Harlan.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

## Questions Presented*

1. Did the Court of Appeals for the Second Circuit in upholding a swift denial of all pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure: (i) lay down a rule at odds with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), (ii) create a rule that ignores the requirements of fair procedures in the Federal courts and due process of law under the Fifth Amendment to the United States Constitution, (iii) reverse a trend of decision for liberal pretrial discovery in complex documentary cases by approving the District Court's theory of "prepare as you go", and (iv) set out a rule of reversible error which is not sanctioned by the case law and is an invitation to the district courts in the Second Circuit to flaunt sensible pretrial discovery rules?

2. Is there under the due proces clause of the Fifth Amendment to the United States Constitution a constitutional right or rule of fairness that would guard defendants against an unnecessarily long trial and does the Court of Appeals' decision in fact deny the existence of such a right or rule even when there are actual incidents showing that a jury was disturbed by the length of the trial?

3. Is there a rule of fairness or a constitutional right that makes it mandatory for a trial court to allow the full scope of cross-examination against a witness whose statements and acts, as testified by others, are before the jury and are binding against defendants under the laws in conspiracy cases; and in any event, did the District Court abuse

* This petition includes a number of points in detail and a rather lengthy review of some of the testimony in order to avoid the need for further discussion in other petitions in this case and at the request of other petitioners.

whatever discretion it might have in applying the usual federal rule of scope of cross-examination to a witness who participated in the acts that lie at the very heart of the alleged conspiracy?

4. Did the Court of Appeals set up an erroneous vague rule concerning reversible error in sanctioning the misconduct of the prosecutor in testifying in summation to his own knowledge of what two co-conspirators would have said had they been called to testify?

5. Did the Court of Appeals create an erroneous subjective test to evaluate the misconduct of the prosecutor in calling a prospective prosecution witness before a grand jury during the course of the trial when the District Court apparently found that the prosecutor had asked at least 45 questions of that witness that went beyond the scope of legitimate inquiry; and does that subjective rule of the Court of Appeals create a precedent that would allow a misuse of grand jury process in furtherance of a pending case so long as some overall excuse can be fashioned?

6. Is the Court of Appeals' ruling on impeaching a witness by a question addressed to a supposed warrant of arrest—without requiring the prosecutor (i) to make an offer of proof before asking the question and (ii) evidence documentation for his question—in conflict with the safeguards set out by this Court in *Michelson v. United States*, 335, 469 (1947)?

## Statutes Involved

Pertinent constitutional provisions and the Federal Rules of Criminal Procedure are set forth in Appendix "B".

## Statement

Mr. Dardi appealed from a judgment of conviction entered in the District Court for the Southern District of New York on March 5, 1963 (28877).* The indictment on which the case went to trial was returned on July 14, 1961.

The judgment followed a trial of more than 11 months before the Honorable William B. Herlands, United States District Court Judge, and a jury (1-27, 149). The trial is reported to be the longest federal criminal trial in history.

Mr. Dardi was found guilty by the jury on four counts of a 30-count indictment: counts 1, 2, 4 and 5. The jury deliberated for four days.

Count 1 charged a conspiracy to commit offenses in violation of 15 U. S. C. §§77e(a), 77e(c), 77q(a), 77x, 77i(a), 78j(b), and 78ff(a), and 18 U. S. C. §1341, and unspecified regulations promulgated by the Securities and Exchange Commission ("SEC"), and to defraud the United States by impeding the functions of the SEC.

Count 2 accused Mr. Dardi and other defendants of using the mails and instrumentalities of interstate commerce and the facilities of the New York Stock Exchange to effect a series of transactions in violation of 15 U. S. C. §§78i(a)(2) and 78ff.(a), and in violation of the accomplice statute, 18 U. S. C. §2.

Count 4 accused Mr. Dardi and other defendants of using the mails and instrumentalities of interstate commerce and the facilities of the New York Stock Exchange to effect a series of transactions in violation of 15 U. S. C. §§78i(a)(6) and 78ff, and in violation of the accomplice statute, 18 U. S. C. §2.

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* The numbers in parentheses refer to the pages in the record on appeal.

Count 5 similarly accused Mr. Dardi and other defendants of using the same facilities to effect a series of transactions in violation of §§78i(a)(6) and 78ff and the accomplice statute, 18 U. S. C. §2.

The trial court sentenced Mr. Dardi to seven years in prison by imposing consecutive sentences. Mr. Dardi was sentenced to 5 years under Count 1, the legal maximum, and 2 years under each of the substantive counts to run concurrently with each other but consecutively to the five-year sentence under Count 1. He was fined $40,000.

## The Facts

We shall, first, describe the persons and corporations most pertinent to this Court's consideration of this petition. Next, we shall go into the testimony of the chief witness for the prosecution, Alexander L. Guterma, but only in the areas of proof which the Court of Appeals for the Second Circuit deemed relevant enough to sketch out in its opinion. Then, finally, we shall treat briefly the testimony in those areas of the other important witnesses—including defendant Herman Brann, the key witness against Mr. Dardi, and Mr. Harold McCollom, the key witness for Mr. Dardi.

We intend to show the facts (i) that this case was a close one as far as Mr. Dardi was concerned and (ii) that although all the participants at the heart of the conspiracy had pleaded guilty and promised to cooperate with the prosecution or, in fact, testified for the prosecution, most of the "facts" against Mr. Dardi relied on by the prosecution have to be inferred. Except for the testimony of defendant Brann, the prosecution's case largely rested on inferences, and so does the case as outlined by the Court of Appeals. And, significantly, every one of the key witnesses

in the case was either an alleged co-conspirator or a defendant who pleaded guilty; every one of them expected and did receive favorable consideration for their "cooperation".

***Some of the Prrsons and Corporations Involved***

*Petitioner Virgil D. Dardi:*

Mr. Dardi has been a leading and respected figure in many financial endeavors. He was never convicted of a crime before this case. His role in the matters that form the basis for the indictment here was pictured as peripheral by Alexander L. Guterma, with whom he became acquainted by chance.

*Alexander L. Guterma:*

Guterma, once the genius of Wall Street, now a five-time felon and admitted briber and perjurer, arranged for most of the events leading to the instant indictment. He was named as a co-conspirator and was the first and most important witness for the prosecution.

*Samuel S. Garfield:*

Garfield, together with Pasternak, were the true partners of Guterma in the several enterprises that formed the bases for several indictments; he was also in the oil business with Pasternak. Early in the trial, Garfield pleaded guilty to various counts in this indictment but has not been sentenced as yet. He is out on bail. Despite his promise to cooperate with the prosecution, he did not testify at this trial.

*Irving Pasternak:*

Pasternak was Guterma's other true partner. Well along in the trial, Pasternak pleaded guilty to several

counts in this and one other indictment and subsequently was sentenced to two and a half years with a provision for parole in 60 days. He is still not in prison. Although he promised to cooperate with the prosecution, he never testified.

*Alan K. Swann*:

Swann was a lawyer admitted to practice in four states. Swann represented Garfield's and Pasternak's interests closely and Guterma's interests occasionally in the various ventures that led to several indictments. When Garfield pleaded guilty at the trial, Swann followed suit; he has not yet been sentenced. He also promised to cooperate with the prosecution, but never testified.

*Hyman D. Lehrich*:

Lehrich was a New York lawyer who became general counsel, vice-president and a director of United Dye & Chemical Corporation. Although Guterma described in detail Lehrich's central role as his legal adviser, Lehrich, under oath, denied any wrong-doing. Lehrich was named a co-conspirator, not a defendant. He testified at the trial on the so-called "Bender incident"; but the prosecution asked no questions about his participation in the alleged conspiracy, and defendants were not allowed to cross examine him on it. The prosecution told the jury that his testimony on the subject would have been "cumulative."

*Robert Eveleigh*:

Eveleigh, named a co-conspirator but not indicted, was Guterma's bookkeeper and a close confederate of Guterma. Guterma made him treasurer of various companies under his control and used him whenever it was necessary to sign checks. He did not testify at trial, but the prosecution told the jury that his testimony would have been "cumulative."

*Herman Brann:*

Brann, an admitted perjurer, pleaded guilty to the indictment here during the course of the trial. Brann was a banker operating, in 1956, out of Tangiers and Geneva and effectively double-crossed Guterma, among others. He has not as yet been sentenced by the trial court. He testified at trial for the prosecution, although pictured as "a thief without honor" in the prosecution's opening.

*United Dye & Chemical Corporation ("United Dye"):*

United Dye was an old American company the stock of which had long been listed on the New York Stock Exchange. In 1955, United Dye was essentially a holding company with subsidiaries engaged in the chemical and insurance business and other endeavors.

*Handridge Oil Company ("Handridge"):*

Handridge was a company organized in the latter half of 1955 by Swann for Garfield, Pasternak and Guterma. After its creation, Handridge acquired substantially all the stock of Franklin County Coal Company.

*Franklin County Coal Company ("Franklin County" or "Franklin"):*

Franklin County was a corporation owned by the Murchison brothers of Texas. In June, 1955, Swann, on behalf of Garfield and Pasternak, negotiated the purchase of Franklin County. Franklin County owned a pipe line in the State of Wyoming and land in Illinois on which oil was discovered.

*Bon Ami Company* (*"Bon Ami"*):

A controlling block of the stock of Bon Ami, an ancient name in the cleanser field, was acquired by United Dye in May of 1956.

***Guterma's testimony in the areas sketched out by the Court of Appeals***

**The Summer of 1955 (330 F. 2d at pp. 321-22)**

In late May of 1955, Guterma sent his associate, Paul Hughes, out to look for office space and a real estate broker put Hughes in contact with United Dye, which was seeking to rent space. Hughes brought Guterma to the space, and Guterma met Mr. Dardi (3374-75). Guterma was then a public figure with a reputation of being a "wizard of Wall Street," and he proceeded to sell himself to Mr. Dardi as just that (Defs. Ex. AA, 3379-82, 3385-86a). Guterma secured the space, and continued to promote himself to Mr. Dardi as a "genius" (*ibid.*, 9682).

A short time after Guterma moved in, Mr. Dardi discussed the possibility of Guterma making an investment in United Dye, of which Mr. Dardi was Chairman of the Board (3388-92). Mr. Dardi told Guterma that he believed United Dye could be a profitable organization by hard work and the use of imagination in acquiring new subsidiaries (3401-02, 3405). Mr. Dardi showed Guterma annual reports and discussed his hopes for its bright future (3390-401). Mr. Dardi discussed the possibility of United Dye obtaining property from Foremost Dairies in exchange for United Dye stock and debentures and Guterma and Mr. Dardi looked into the possibility together (3402-03, 3373-74).

Mr. Dardi did seek to bring Guterma into the United Dye picture but only because he believed in Guterma and Guterma gave every indication that he was exactly what

his reputation made him out to be (715-16). Mr. Dardi said that if Guterma was willing he would try to buy the a controlling block of stock at $10 a share for Guterma (3405-06). At no time in Guterma's testimony was there any suggestion that any of this was done with a mind to break the law; there was no evil connotation to any of his testimony in this area.

Guterma and Mr. Dardi entered into a contract. Mr. Dardi agreed to obtain 30,000 shares of United Dye for Guterma; Mr. Dardi was given a six-month option to buy 15% of the stock at $10, but Mr. Dardi's price was to be slightly over $11 (Gov. Ex. 1). And so, because Guterma believed that United Dye would be a profitable company he bought 38,500 shares for $385,000 (3420).

Mr. Dardi tried all through the summer to put Guterma on the Board of Directors (3425-26). All the while Guterma discussed the future of the company with Mr. Dardi; as Guterma testified, all these conversations were aimed not at any illegal conspiracy but at creating a company that would blossom and prosper (3420, 3426-28, 3474). In a letter, Mr. Dardi outlined to Guterma the many things that he hoped Guterma would do to build a "tremendous company"; none of them had anything to do with anything but making United Dye a most successful company (Def. Ex. K; 5874-75).

The seamy side of Guterma's testimony lies not in what Guterma said his relationship with Mr. Dardi was and not in what he said or did with Mr. Dardi, but what he did with his *true partners*, Garfield and Pasternak.

Guterma had first become associated with Garfield and Pasternak in January and February of 1955 and became associated with them in connection with the purchase of the stock of Franklin County Coal Company in the summer

of that year (755, 756-57). Franklin County was a corporation owning extensive pipelines in Wyoming and coal and oil lands in Illinois. Pasternak, Garfield and Swann had been negotiating with the wealthy Texans, the Murchison brothers, to acquire Franklin County's stock; and in June of 1955 they requested Guterma to join with them in what was to be a total investment of about $3,000,000 (757). For the soundness of the investment, Guterma relied on the judgments of Garfield and Pasternak, who were experienced oil men (3946-50). It was the intention of Pasternak, Garfield, Guterma and Swann to merge Franklin at a later time with a company listed on the American or New York Stock Exchange (758-59). Division of the partnership profits among Pasternak, Garfield and Guterma was to be on an equal basis, with Pasternak and Garfield taking care of Swann, the lawyer, from their share (759). The arrangement that was worked out among these three was out of the sight and hearing of Mr. Dardi (759); the prosecution did not even attempt to show that Guterma told Mr. Dardi any of this.

In the summer of 1955, Pasternak and Garfield purchased the stock of Franklin County by making an advance of $800,000 and giving the Murchisons a note of Garfield and Pasternak for $519,000 (772-73). All the stock of Franklin County was pledged as security on the note (726). Swann told Garfield, Pasternak and Guterma that they would have to form a corporation that would own the Franklin County stock if eventually the assets of Franklin County were going to figure into the merger with a listed company (779 *et seq.*). This was the genesis of Handridge Oil Company, which was formed late in the summer of 1955 (781-82).

In the summer of 1955—so testified Guterma—he told Mr. Dardi that he, Garfield and Pasternak owned Franklin

County (787). Franklin, he said, owned a pipeline in Wyoming and that it would be a "very good deal" for United Dye to acquire Franklin County for an exchange of stock, on a basis similar to that which was contemplated for the purchase of the property from Foremost Dairies (787). Unlike the case of Guterma's purchase of Franklin County stock (3947-48), Mr. Dardi said he would be interested if it was "a businesslike proposition" and said that he needed further details concerning the financial condition and earning record of Franklin, and that he would have to put the proposition before the Board of Directors of United Dye (788). Guterma delivered the financial statements of Franklin County to Mr. Dardi (789-90). Guterma and his associate, Eveleigh, discussed with Mr. Dardi the financial condition and earning record of Franklin; and Mr. Dardi said that he would take the matter up before the Board of Directors (790). And in July or early August of 1955, the Board of Directors of United Dye appointed a committee of Mr. Dardi, alleged co-conspirator Lehrich, and Mr. David Fishman, another United Dye director, to pursue the matter (790-91). At no time did Guterma say that he told Mr. Dardi that the deal was bad or that there was a fraud involved or that there was any sort of cheat; indeed, he was representing to Mr. Dardi that this was a wonderful deal for United Dye (787-90). All through 1955, Guterma was to tout the merger to Mr. Dardi (919).

**The Fall of 1955 (330 F. 2d at pp. 322-23)**

On September 1, 1955, Guterma finally became a director of United Dye, an officer and, indeed, Chairman of the Board of Directors (801, 3793).

One proposed acquisition fell through—the Foremost Dairies deal (3882). The proposed Handridge merger, however, progressed. At a meeting held on September 1,

1955, the Board of United Dye passed Guterma's motion authorizing the executive committee of United Dye to engage an expert suggested by Guterma to prepare a report on the Plains Pipelines Division of Franklin County (5487, 5908-09). Mr. Dardi and the rest of the Board did not know that the expert was anything but an independent and good geologist (4024, 5902-03). At Board meetings in the fall of 1955, Guterma spoke and told the directors, including Mr. Dardi, that Franklin County had a tax loss of about $2,000,000 and that it would make money after recycling plans in the area were opened up and after water flooding went into effect. Guterma said that United Dye would make an amount somewhat under $2,000,000 and the profit would be offset by the tax loss—the income would all be tax-free (4017-20). Guterma told the directors, including Mr. Dardi, that he believed that Handridge would be a great vehicle for earnings and eventually United Dye would have a large net worth, particularly if they were prudent in making acquisitions (4020-1). Guterma told the directors, including Mr. Dardi, that they would have to pay more if they issued stock than if they paid cash for the properties to be merged in United Dye (4021).

Guterma also testified that he, accompanied by Mr. Dardi and Lehrich, spoke to officials of the New York Stock Exchange in the fall of 1955 (803-04, 808-09). On two of these occasions Guterma offered to loan his stock to brokers to cover short sales in a dangerously rising market (*ibid.*). There was nothing evil or bad about the offer to loan stock; and Guterma made nothing evil out of it. As Guterma stated, the listing agreement of United Dye provided for the lending of stock by its directors to brokers when there appeared to be a danger of a "corner" on the market (806).

Not only did Guterma *not* tell Mr. Dardi what he, Pasternak and Garfield were plotting, but he laid the foun-

dation to place the blame on Mr. Dardi if anything went amiss. The Court of Appeals, in its opinion, accepted a version of events here that ran contrary to Guterma's testimony and confuses several separate events (330 F. 2d at pp. 322-23): Mr. Dardi did not act in concert with Guterma and his group to sell United Dye stock.

Here are the facts according to Guterma. Early in the fall of 1955, Guterma met with Garfield and Pasternak; Mr. Dardi was not present (927). Guterma told Garfield and Pasternak that among them they had 30,000 shares of United Dye and that for the Handridge merger to go through, the market price for United Dye stock would have to be brought down to a more realistic level (927-28). Guterma saw two advantages in selling their United Dye stock. The sale of the 30,000 would tend to reduce the market price and it would give him, Pasternak and Garfield assurance of a profit in case the merger did not go through (927-28). In October, Guterma, Pasternak, Garfield, Swann and their friend Roen sold the stock. The profits were split among Guterma, Garfield and Pasternak (923-29, 1722-23; Gov. Exhs. 10, 11 and 12). *Of all these transactions, Mr. Dardi was unaware* (*ibid.*).

To cover himself on his side deal, Guterma also had a discussion with a Mr. Hoopman of the SEC in New York City on the subject of loaning shares to private individuals and secured Mr. Hoopman's approval, so long as the sales were not for Guterma's own account (1192-94). But again Mr. Dardi was not aware of this; there is no evidence that he was. Guterma does not say that he was.

Actually it appears that Guterma was deliberately misleading Mr. Dardi and even preparing to place the blame on Mr. Dardi if anything untoward happened. In a letter dated November 8, 1955, Guterma wrote to Mr. Dardi, accusing him of being a participant in a syndicate conducting

market operations in United Dye stock (Def. Exh. II). On November 10, 1955, Mr. Dardi wrote to Guterma and executed an affidavit; he denied the allegations in Guterma's letter. Mr. Dardi denied buying or selling any stock except the 6,500 shares that were acquired by Rialb Associates, Inc., in which Mr. Dardi had an interest, pursuant to his option agreement with Guterma and 1,000 shares sold around the first of October. Mr. Dardi said that he was as concerned as Guterma, apparently, about the market activity in United Dye (Def. Exh. JJ). Guterma said that he was happy to have received Mr. Dardi's letter and affidavit. (3883, 3918-27, 3939-41). On the very day Guterma was accusing Mr. Dardi of trading in United Dye stock (Def. Exh. II), Guterma himself had already delivered for sale, or ordered sold, at least 18,000 shares (Gov. Exh. 14).

**Late Fall of 1955 and Early Winter of 1955-1956**
**(330 F. 2d at p. 323)**

On December 5, 1955, the Board of Directors approved the merger between Handrid'ge and United Dye, if stockholder approval could be secured (Def. Exh. VV).

In December of 1955, Guterma invited some people to meet with him in Florida as his guests over the Christmas holidays. Mr. Dardi went to Florida during the holiday period and stayed at the Isle of Capri Hotel in Miami, but he did not go as Guterma's guest; he paid his own bill over the Christmas holidays (4081-82). Also present in Miami were Mr. Edward McCormick, President of the American Stock Exchange (4078-83) and Lehrich, Eveleigh, Culpepper, Pasternak, Leonhardt and Gerfield, who all came as guests of Guterma (910).

On direct examination, Guterma stated that he did not inform those whom he invited down to Florida why they were invited. Guterma said that there was not one general meeting in Miami at which all of the parties were present.

but rather there were a series of meetings in his penthouse atop the Isle of Capri Hotel (912, 916). Guterma told different things to different people. When he talked to Mr. Dardi, he discussed the possibilities of the Handridge merger and what it would do for United Dye. He told Mr. Dardi that Franklin County was a very good company and that it would be a money-maker and Mr. Dardi agreed with him. They also discussed the possibility of putting other companies into United Dye (919). Guterma remembered that he told Mr. Dardi that the merger with Handridge was a good thing for United Dye and it would bring revenue-producing assets into United Dye (3133-34).

When Guterma talked to Garfield and Pasternak, he said, they discussed the stock price of United Dye, the eventual disposition of the stock of United Dye and what the price of United Dye stock would be after the merger if the earnings of the pipeline were sustained (919-20).

Guterma said that when he had conversations with Garfield and Pasternak about the disposition of the United Dye stock, Mr. Dardi was *not* present (921).

One significant event during this gathering in Miami came out in the testimony of broker-dealer Leonhardt, months later in the trial. It highlighted Mr. Dardi's role as an outsider in Guterma's plans. Guterma took Leonhardt aside and told him of his plan to get rid of Mr. Dardi (9705-06). Guterma told Leonhardt:

> "I say to you in great confidence that I am arranging to have Mr. McCormick, the president of the American Stock Exchange, resign from the American Stock Exchange and to become president of United Dye & Chemical and I will guarantee Mr. McCormick's salary, capital gain, and other benefits" (9706).

Mr. Dardi paid his own way; Mr. Dardi was told of a bright future of United Dye; Mr. Dardi was not part of the conversations dealing with the plot to sell the shares of United Dye stemming from the Handridge-United Dye merger; Guterma plotted to replace him—this is the heart of the Christmas "meeting" of 1955 for Mr. Dardi, a pariah to Guterma.

**The Spring of 1956 (330 F. 2d at p. 323)**

In April, 1956, Mr. Dardi informed Guterma that a controlling block of shares of the Bon Ami Company was available, and could be purchased and that the purchase of these shares would secure control of Bon Ami for United Dye. Mr. Dardi showed Guterma a balance sheet of Bon Ami. It was sound and in a strong cash and liquid position, although not making much money; it had, indeed, $3,000,000 in excess of its current liabilities. Mr. Dardi said that 60,000, out of an outstanding 200,000, shares of Bon Ami stock were being offered at $27.00 a share by a group headed by a Mr. Cummings. Mr. Dardi proposed that he would talk to Mr. Cummings on what looked like, and was, a wonderful business opportunity for United Dye (1343-47).

Guterma spoke to Pasternak and Garfield, but what he discussed with them was more than the desirability of acquiring Bon Ami. Out of the presence of Mr. Dardi, Guterma went into the problem of paying the $519,000 to the Murchison brothers so that the pledged Franklin stock could be delivered free and clear upon the merger of United Dye and Handridge. Garfield and Pasternak claimed they did not have the money. Guterma told them that if they acquired control of Bon Ami, he would arrange it so that a loan would be made to Garfield to pay off the Murchison brothers. Pasternak and Garfield fell into line (1352-54).

Back to Mr. Dardi went Guterma in New York City. Mr. Dardi said he had contacted the Cummings group and they would sell 60,000 shares of Bon Ami for $1,300,000 in cash and a note for $320,000. Guterma told Mr. Dardi that United Dye did not have the money to buy the stock, but that United Dye would have the $750,000 coming from Handridge after the merger. Guterma suggested to Mr. Dardi that money could be lent to Garfield and Pasternak and they in turn could lend the money to United Dye to assist United Dye in making the Bon Ami acquisition (1354-57, 1357).

Lehrich, the lawyer, was consulted and he said that it would not be a violation of the merger agreement for Garfield and Pasternak to deliver $519,000 to United Dye and have United Dye assume their indebtedness to the Murchisons. If that were done, then United Dye would have $519,000 to use—a good thing, of course, for United Dye. Guterma instructed Mr. Dardi and Lehrich to make the necessary arrangements to acquire the 60,000 shares of the Bon Ami stock (1354-55).

Guterma had no further discussions with Mr. Dardi about the Bon Ami purchase before the closing of the Handridge-United Dye merger and the Bon Ami stock-purchase (1355). Guterma instead spoke to Swann (Pasternak's and Garfield's attorney) and Garfield. Guterma informed Swann that Bon Ami would make a loan to Garfield and instructed Swann to speak to Lehrich in order to work up the documents (1356-7). To obtain the $1,300,000, United Dye, he said, would have to get short term loans from banks and some of Guterma's companies, and get a prepayment of the $519,000 from Garfield and Pasternak and an additional advance of funds from Garfield (1357-8).

Most of the testimony concerning how the Guterma-Pasternak-Garfield partnership acquired its money was en-

tirely unnecessary and over-dramatized into the appearance of "looting" of Bon Ami, *of which there is not any true evidence* and which the prosecution stipulated out of the case by not questioning the value of bonds sold to Bon Ami (2683, 2693). One fact is certain from Guterma's testimony: Mr. Dardi believed the acquisition of Bon Ami was in the best interests of United Dye (1343-44).

**The Balance of 1956 (330 F. 2d at pp. 323-24)**

As part of the December 5, 1955, agreement to merge Handridge with United Dye, Pasternak and Garfield guaranteed the return of $2,400,000 by December 31, 1957, from the Plains Pipeline Division of Franklin County. Garfield and Pasternak deposited 85,000 shares of United Dye stock with United Dye as security for this so-called "throughput" guarantee. If the pipeline company returned $2,400,000 in the period, then all the shares were to be returned by April 15, 1958; but 1,000 shares were to be surrendered to United Dye for each $12,000 of deficiency. United Dye, no matter what happened to the pipeline company, would have to hold its security until the period ran (1535-6, Gov. Exh. 7, Sec. 11).

After conferring with Garfield and Pasternak, Guterma, at a meeting of the Board on June 6, 1956, told the directors of United Dye that in view of the drop-off in the amount of oil going through the pipeline, it was advisable to consider a transaction with Garfield and Pasternak whereby the guarantee under the merger agreement would be released. All the directors agreed that a figure of $700,000 to $900,000 was good consideration for the release (4225-26). The matter again came up at the meeting of the Board of Directors on July 23, 1956. Guterma as Chairman announced that negotiations had been going on with Garfield and Pasternak concerning the release of their guarantee

for a consideration of $700,000 (4226-28). At a meeting of the executive committee of United Dye, Guterma announced that a transaction had been worked out with Garfield and Pasternak whereby they would be released from their guarantee. Guterma read geological opinion letters, and he read an opinion letter of the law firm of Weisman, Celler, Allen, Spett and Sheinberg, which said that release of the guarantee would be perfectly legal (4228-32, Def. Exh. D (2d) I-V). Guterma informed the directors that there was a very good reason for United Dye releasing the stock, and indeed there was. No one could tell in August of 1956 what the market price of United Dye stock would be in April of 1958; and no one could say whether or not the pipeline division would return income of $2,400,000 by the cut-off date. Mr. Guterma told the directors that United Dye would be much better off having cash and securities in hand in 1956 than having the possibility of taking some of its own stock back as late as April 15, 1958. To use a *cliché*: the directors, including Mr. Dardi, were told by Guterma that a bird in the hand was worth two in the bush (4293-95).

And so the release was given for $450,000 in cash and 115,000 shares of stock of a company called D. C. M. (1540). Here again, Guterma succeeded in convincing Mr. Dardi and his fellow directors—some of whom were concededly not co-conspirators in this case—that the release was in the best interests of United Dye.

It was a fact, said Guterma, that he had an agreement with Garfield and Pasternak in December of 1955 that after the United Dye-Handridge merger, a great part of the United Dye shares received by them would be sold to obtain the proceeds (1644-45). The Guterma-Pasternak-Garfield deal to sell, discussed in the absence of Mr. Dardi, called for Guterma to work out the time and circumstances

of the sales in the over-the-counter market. In the meantime, to keep the price from dropping, Guterma was to buy up large blocks of stock as they appeared on the New York Stock Exchange. The "stabilization" program was worked out with Hughes; nominees or "beards" were to be used (1645-48). The cost of stabilization program was to be borne by Guterma, Garfield and Pasternak. Mr. Dardi was not involved in this financial deal; and Guterma did not testify that he informed Mr. Dardi of it (1644-45).

But in June, 1956, Guterma discovered that Pasternak had sold 10,000 shares on the New York Stock Exchange and that he—Guterma—had bought them (1590-97). Angry Guterma called Pasternak in Denver, and Pasternak admitted that he sold 10,000 shares of United Dye stock without notifying Guterma because he "needed" the money. Guterma told Pasternak that Pasternak wasn't supposed to sell the stock without telling him and that Pasternak was disrupting the market. Guterma said that he would talk to Garfield, who was in Michigan, about it. Pasternak said that he would think over Guterma's "request" not to sell any more shares pending word from Garfield (1596-97). Guterma met Garfield in Detroit. There, in Guterma's presence, Garfield telephoned Pasternak. Garfield told Guterma that there was no way to dissuade Pasternak from selling the stock unless Guterma agreed to an immediate distribution. Finally, Guterma agreed that he would return to New York and organize a sales force of over-the-counter brokers to distribute the major portion of the United Dye stock, provided Garfield and Pasternak assured him they would not sell any more shares on the New York Stock Exchange and would channel all the stock through him. Garfield then telephoned Pasternak in Denver, and Garfield told Guterma that he had obtained assurances from Pasternak that he would not

sell any of the shares in the open market (1597-1600). Of all this, Mr. Dardi was unaware.

When Guterma returned to New York he notified Paul Hughes—not Mr. Dardi—that he was going to "distribute" the United Dye stock and that he was going to continue to support the market in the meantime on the New York Stock Exchange (1600-01).

Then Guterma spoke to various brokers about selling United Dye stock on the over-the-counter market (1618-38). And the three partners began to sell their stock.

It was only at the end of Guterma's story that Guterma arrived at Herman Brann, the man described by the prosecution in its opening in terms of a thief without honor (419). Some time in July of 1956, in New York City, Mr. Dardi introduced Guterma to Brann. Mr. Dardi did not know Brann well; he had once been introduced to him several years before briefly by one Fabian Mayers (12858). Mr. Dardi thought Brann was a very influential international banker (1665). According to Guterma, Mr. Dardi told Guterma before meeting with Brann that Brann could sell shares of United Dye stock in Europe and in North America and that Brann had a bank in Tangiers. Guterma did not testify that Mr. Dardi told him that Brann should be used to stabilize any market (1664-65).

Mr. Dardi arranged an introduction of Brann and Guterma in July of 1956 in the apartment of one Ira Gilden at the Waldorf Towers in New York City. Mr. Dardi, Mayers, Brann, one Harry Adams, an Air Force officer, and Guterma were present in the Gilden apartment. Guterma said that he then had a conversation with Brann relating to shares of United Dye (1666-67). During the conversation between Guterma and Brann, Guterma did not know exactly where Mr. Dardi was standing, but Mr. Dardi was

talking to Mayers for a time. (4302-03, 5949-50). In fact, according to Guterma, Mr. Dardi and Adams left a half hour or 45 minutes after they arrived (4304). Guterma actually did not make any agreement with Brann to help "stabilize" any market or to buy any stock in Europe while Mr. Dardi was present or even that day (4388). Guterma said the arrangement with Brann was made later by him—not Mr. Dardi (4389).

The arrangement that was finally worked out by Guterma was that Brann would buy United Dye stock on the New York Stock Exchange—taking advantage of the 30% margin requirement as opposed to the 70% margin requirements in the United States (1668-69). The money was to be supplied by Guterma, who was in charge, but the money was to be delivered by Guterma's associate, Louis Levin (1669-71). Eventually Brann started to perform for a group called "Marco Polo". According to Guterma, the Marco Polo group was a joint venture among Brann, Mayers and Rand—and did not include Mr. Dardi (4415-16).

According to Guterma it was he, Guterma, who introduced Levin to Brann and sent Levin to Tangiers or Europe to visit Brann twice in 1956 (1672, 4415). Guterma had heard from Paul Hughes that Brann was not doing what he was supposed to do in "stabilizing the market". While he was buying the stock and charging a fee for it, Brann was dumping the stock right back on the New York Stock Exchange, "back-dooring". Guterma (not Mr. Dardi) told Levin to go to Europe and liquidate Brann's accounts, which he did. According to Guterma, $180,000 had been sent to Brann and Levin brought back less than $60,000 (1672-73).

**The Final Accounting Among the True Partners: The Fall of 1956-Winter of 1957**
**(*Cf.* 330 F. 2d at p. 324)**

Guterma said that his program to sell the Haudridge stock and keep the market stable lasted until October of 1956 (1673).

In October, Guterma flew to Clare, Michigan, to meet with Garfield, Pasternak, Eveleigh, Roen and Eli Boyer, an accountant employed by Garfield and Pasternak. Mr. Dardi, of course, was not present, for the group discussed the liquidation of all accounts among the three true partners and the division of the spoils. Boyer and Eveleigh were instructed to prepare the final accounting on all ventures in which the partners had participated (1675-80). The share was to be ⅓ for Garfield, ⅓ for Pasternak and ⅓ for Guterma (1681). There was no share for Mr. Dardi (1681-82).

There was then a real meeting in January of 1957 in the Eden Roc Hotel in Miami Beach. This time the meeting was in Garfield's suite. Present at this meeting were Garfield, Pasternak, Roen, Eveleigh and Guterma. Mr. Dardi was not there; for this was the final accounting among the true partners. The meeting lasted all day. Eveleigh and Boyer had prepared the accounts; and the true partners and their true associates discussed each item (1720-26).

There was no discussion about paying off Mr. Dardi or giving him anything or taking into account any money given him; he figured not a whit in this settlement (3359-74). Mr. Dardi's participation in this settlement was nothing because, as Guterma said, there was nothing coming to him (3373-74).

**The "Bender Incident" (330 F. 2d at pp. 333-34)**

Guterma also exculpated Mr. Dardi from the so-called "Bender incident." We avert to it briefly.

There was testimony by Guterma that Garfield was making arrangements or tried to make arrangements through the then ex-Senator Bender to have the SEC discontinue its investigation of the United Dye situation (1750). Garfield claimed that he had arranged to pay Bender $100,000 to contact the Chairman of the SEC (1788-92). Lehrich went down and saw Bender and gave him a written memoranda of the facts for presentation by Bender to the SEC Chairman (1792-95).

Guterma testified that early in 1958 he spoke to Mr. Dardi about contributing to the "Bender fund". Here is what Guterma testified to:

> "Mr. Dardi told me that Mr. Garfield, and I believe it was Mr. Lehrich also, tried to collect the $20,000 from him but that he wasn't going to pay the money, that he didn't want to have anything to do with this affair" (1797).

When the testimony was over, the trial court instructed the jury that "as far as defendant Dardi is concerned [Guterma] exonerated and exculpated the defendant Dardi with respect to the so-called Bender incident" (1852).

**Conclusion**

Thus, Guterma's testimony erected the structure for the prosecution's claims of conspiracy or, more properly and realistically, conspiracies. Guterma said he plotted with Pasternak, plotted with Garfield, plotted with Swann, plotted with Brann, plotted with Eveleigh, plotted with Hughes,

plotted with Lehrich, plotted with Roen. But he would not say that he plotted with Mr. Dardi except to make United Dye a great and wonderful company; he would not place Mr. Dardi in the heart of his schemes. There were intimations and documentary evidence that he duped Mr. Dardi, who was pictured by him as a most gullible person.

***Other witnesses, Brann and McCollom***

From the time Guterma left the stand to the time that defendant Brann, who pleaded guilty in the interim, took the stand, no witness changed the picture of Mr. Dardi and his relationship to the "in-group," nor the import of the evidence that showed Guterma had gulled Mr. Dardi.

No witness changed the facts that after September 1, 1955, Guterma was boss and Guterma was the true partner of Pasternak and Garfield (with a junior partnership to Swann). No witness changed the tone of Guterma's testimony on Mr. Dardi's innocent involvement with what the prosecution called the early "phases" of its alleged "single conspiracy." Garfield never testified. Pasternak never testified. Swann and Eveleigh never testified. Roen never testified. Lehrich was called by the prosecution, but did not testify on matters relating to the facts of the conspiracy charged in the indictment.

Attorney Leonhardt, the admitted perjurer and Guterma's former partner in the securities business, placed Mr. Dardi far from the inner operations of Guterma's schemes. He established Guterma's plot to oust Mr. Dardi (9705-06). Leonhardt did say that either Mr. Dardi or Guterma told young Paul Hughes to give Leonhardt brochures some time following the merger of Handridge into United Dye. But all that was surmise; he couldn't remember who it was (9385-88). The conversations that Leonhardt had with Guterma about the distribution of the stock emerging from

the Handridge-United Dye merger were not in Mr. Dardi's presence (*e.g.*, 9174-75, 9178-80). Even Leonhardt was told by Guterma that his selling of the United Dye stock would be completely legal and lawful (9720-22); and Leonhardt said that he never intended to violate the SEC laws (10008).

Paul Hughes, Guterma's "errand boy" and admitted perjurer, was called by the prosecution, and testified about many events. Again, he did not place Mr. Dardi close to Guterma or to the Guterma-Pasternak-Garfield partnership. Hughes testified that in the summer of 1956 Mr. Dardi was in the habit of asking him how sales of United Dye stock were going (11933-36). At this point in time, Hughes admitted, Mr. Dardi was in charge of sales promotion of Bon Ami and was spending much of his time out of town and at 17 Battery Place, Bon Ami's office (12115-17).

From Hughes also came testimony that he prepared publicity material and showed it to Mr. Dardi which after everything was said and done was about a 95¢ reprint of the United Dye annual report (12008 *et seq.*).

The stock salesman, ex-convict Barkley, who was forbidden to sell stock, also testified for the prosecution. He spoke of how Guterma brought him into the selling picture; but again Mr. Dardi was not present during the Guterma-Barkley deal to market stock stemming from the Handridge-United Dye merger (16693-702). All that Barkley could say against Mr. Dardi was that Mr. Dardi also asked him, "how are sales going?" (16780).

The prosecution revisited the Bender affair by calling attorney Lehrich, named as a co-conspirator. Lehrich testified that he was not involved in any conspiracy. His testimony about the Bender affair differed in significant respects from that of Guterma (18462-640). Lehrich flatly denied

that Garfield told him, before he went to see Bender, that Garfield had arranged to pay $100,000 to the ex-senator from Ohio (18466-68). According to Lehrich, his trip to Bender was a legitimate trip, not something nefarious. His duty was to go down to Washington to present an argument to the ex-senator that an injustice was being done. At the time, the ex-senator had nothing to do with the SEC. He was working on a day-to-day basis as a consultant of some kind to the Department of the Interior. When in Washington, Lehrich said that he dictated what he described was a fair summary of the facts before the SEC, the only mistakes being typographical errors (18780-82, 18919 *et seq.*).

Lehrich testified that some time after the event, and exactly when and where he could not say, he spoke to Mr. Dardi about contributing to Garfield's $100,000 fund, fee of whatever it was in the Bender affair (19099-101). According to Lehrich, Mr. Dardi said that he didn't have the money and couldn't pay at that time, but would do so later (18190-91). The substance of Lehrich's testimony was that Mr. Dardi had evidenced some sort of willingness to contribute to the transaction that Lehrich was involved in, a transaction that was in Lehrich's view totally proper (18959-60).

***Brann's testimony and the defense***

Late in the trial, Herman Brann took the stand. In June, he had pleaded guilty to two counts in the indictment and had promised to cooperate with the prosecution (7243, 7786). He came to the stand armed with all sorts of documents—letters, telegrams and telexes, documents that he swore before the SEC he never had (15098-102, 15123-26). After having sat in court and having heard Guterma's testimony, and with all these exhibits before him, Brann pro-

ceeded to construct a web that entangled Mr. Dardi in selling United Dye stock and that contradicted Guterma.

The only point on which Braun agreed with Guterma was that Mr. Dardi introduced Braun to Guterma in a hotel room in New York; but even as to the hotel room Braun and Guterma contradicted each other. Braun did not say that Mr. Dardi left a half hour later and before Guterma, but that Guterma left first (12879-80). Where Guterma put himself, Braun put Mr. Dardi, the only defendant still on trial with whom he had contact. So it was that Braun testified that Mr. Dardi, not Guterma, explained to him the type of stabilization program that was to be entered into (12280). Although Braun admitted that he made his deal with Guterma, he claimed that it was Mr. Dardi who was in contact with him in Europe with respect to the operations of his trading. Levin, Guterma's agent according to Guterma (1671), became Mr. Dardi's agent. The "Marco Polo" group of Braun, Mayers and Rand was made to include Mr. Dardi.

Braun effected this transformation with documents that referred to "fat boy"; and Braun testified that "fat boy" was Mayers' nickname for Mr. Dardi, and not for Guterma (12948).

But even on direct examination Braun was shown to be the thief without honor. He "back-doored" the stock and double-crossed Guterma (13096). He did lie to Levin, Guterma's agent, saying he had stock which he already sold (13277 *et seq.*), and pretending that brokers were calling him for margin on stock already sold (14742-45). On cross examination, his account of his financial arrangements became gibberish, and he jumped from story to story as he was caught in lies (*e.g.*, 14924-25, 14926-27, 15312, 15441-45).

There are many things to say about Brann's lack of credibility; how one document that Brann swore was sent *before* any SEC investigation and could not be self-serving turned out by exposure to have a reference to an SEC investigation on the fifth page (Gov. Exh. 876, 15298-99); how a "straddle" transaction turned out to have one vital missing element, a maturity date on the call side (13998-14003, 14007-10, 5437). The point is that Brann was a double-double dealer, who did and was capable of counterfeiting documents to save himself, and Mr. Dardi had a rebuttal of Brann's testimony in large part through the documents and testimony of Brann himself.

In addition, Mr. Dardi called Harold McCollom, who Brann had testified dealt with him in United Dye stock. Mr. McCollom came from Europe and put the lie directly to Brann: there was no straddle with or without a maturity date (18898, 19816-19, 19829-30). He told the jury that the cables put in evidence through Brann were complete forgeries (Gov. Exh. 866, 860; 19923, 19937). Indeed, one of the telegrams was supposedly sent from Geneva when Mr. McCollom was in Italy; the others contained a date stamp a year prior to the date it was supposed to have been sent. Another letter in evidence addressed to Mr. McCollom was never received by him (Gov. Exh. 854; 19918). McCollom said that no one ever mentioned Mr. Dardi's name to him until late 1957 and that he did not meet Mr. Dardi until March of 1958 even though he was supposedly Brann's associate in two banks in the summer and fall of 1956 (19945-46). He told of seeing Brann with blank stationery of the Moroccan Bank long after the Moroccan Bank had vanished (19943).

## REASONS FOR GRANTING THE WRIT

### 1

**The Court of Appeals for the Second Circuit has handed down a decision on pretrial discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure that (i) is at odds with this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), (ii) ignores general rules of fairness in federal courts and requirements of due process of law under the Fifth Amendment to the United States Constitution, (iii) reverses a liberal trend of pretrial discovery in complex documentary cases by approving a theory of "prepare as you go", and (iv) sets out a vague rule of reversible error that will make it impossible to reverse a case ever in the Second Circuit because of denials of proper discovery and thus is an invitation to flaunt sensible pretrial discovery.**

The indictment on which Mr. Dardi was tried was returned in July of 1961. The indictment superseded two other indictments—one returned in 1959, the other in 1960.

On September 25, 1961, Mr. Dardi's counsel and other defense counsel filed motions for discovery and inspection under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure and motions for bill of particulars under Rule 7(f) of those rules (27518-609). Mr. Dardi's demands were set out in a schedule of 55 items; they not only categorized documents but asked for particular documents; one other counsel, with whom all defendants joined, itemized 88 items, which also included specific documents. And one defense counsel listed 13 categories of documents (27577 *et seq.*, 27421-37, 27340-43).

Nowhere in its briefs on appeal did the prosecution argue that the documents that were requested were not within the *objective criteria* set out by this Court in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), and the cases that have followed that line of decision. See, *e.g.*, *United States* v. *Iozia*, 13 F. R. D. 335 (S. D. N. Y. 1952); *United States* v. *Gross*, 24 F. R. D. 138 (S. D. N. Y. 1959). The documents requested under Rule 17(c) and Rule 16 were evidentiary in character (indeed, most documents offered in evidence by the prosecution fell within the categories listed by defendants), were furnished the prosecution by others either voluntarily or through service of process, and could not be gotten by defendants by other means. Most of the documents had been in the possession of the prosecution for several years. There can be no question that the material would have been useful to the defense; the prosecution was later to offer some of the documents by differently categorizing them, if certain concessions were made (28442, 28842-46, 29353).

On September 28, 1961, Mr. Dardi's counsel wrote to the prosecution requesting a conference to discuss the question of stipulating items for discovery and particulars (28463).

The prosecution ignored this request. Its next step was to apply, on November 14, 1961, for the appointment of a single judge in the District Court under the District Court's rule regarding complex cases on the ground that "the required volume of evidence, by itself, precludes this case from being considered a simple criminal case" (27950-51). There was no question that this was going to be a complex documentary case—as it proved to be.

The Chief Judge of the District Court heard argument, granted the prosecution's motion for the appointment of a single judge, but deferred that appointment. The Chief Judge noted his concern for a proper pretrial procedure

in this case and recognized in this type of case, with its "required volume of evidence", the need for full documentary disclosure by the prosecution. He thought that the single judge "may well direct the government to give a list of witnesses the government expects to call so that defendants may have an opportunity to prepare in advance for cross-examination" (27983). He anticipated that the prosecution would turn over *all* documentary proof in order to speed up the trial and enable the defendants to prepare for this documentary case. He said: "After it is granted, and I do pick out a judge, I feel quite certain that by proper application you will get a disclosure of all documentary proof" (27985).

And, of course, the trend in these involved documentary cases involving Securities Act violations has been to give broad pretrial discovery so that it would be possible to prepare an adequate defense; and the trend has been to give sufficient time for accountants and attorneys to go through the mass of documents. See *United States* v. *Schindler*, 24 F. R. D. 142 (S. D. N. Y. 1959); *United States* v. *O'Connor*, 237 F. 2d 446 (2d Cir. 1956); *United States* v. *Greater Blouse, Shirt & Neckwear Contractors Ass'n*, 177 F. Supp. 213, 222-25 (S. D. N. Y. 1959); Note, *Pretrial Disclosure in Criminal Cases*, 60 YALE L. J. 626, 633-39 (1951); *Developments-Discovery*, 74 HARV. L. REV. 940, 1059 (1961); see also *United States* v. *Duncan*, 22 F. R. D. 295 (S. D. N. Y. 1958); *United States* v. *Tellier*, 19 F. R. D. 164, 169 (E. D. N. Y. 1956).

The expectations of the parties and the Chief Judge of the District Court were dashed by the single judge who was assigned to the case in December of 1961. Following adjournments of the motions after the single judge was appointed at the instance of the prosecution and the judge, a hearing was held on the pretrial motions on February 5,

1962. Three days later the trial court handed down its decision: all defense motions denied; the trial to commence in eighteen days as requested by the prosecution (28481).

While proper pretrial discovery under Rules 16 and 17(c) has no connection with concessions that were going to be made or were asked to be made by the defense, we set the record straight for this Court: there was nothing offered by the prosecution or the trial court that was an adequate substitution for proper pretrial disclosure on any meaningful basis.

On February 8, the prosecution filed a voluntary bill of particulars that dealt primarily with statements that were going to be claimed false or misleading, names of persons to be proved as the persons to be defrauded and a few minutiae (28371). This was followed by two full court days of pretrial conferences out of the eighteen days inclusive of Saturdays and Sundays that were available to the defense for preparation (28461).

Here in summary are the events following the filing of the eight-page bill of particulars:

February 15, 1962 — A day-long pre-trial conference was held (29307 *et seq.*).

The prosecution offered a list of 68 categories of documents that were to be made available upon reasonable notice before trial (12 days away) at its offices during working hours. The records consisted of brokerage and bank records. The prosecution and the court refused to adjourn the case (28432-35, 28456-60).

The trial court hoped that counsel would agree to a stipulation which would cover specifically enumerated documents *after* defendants had seen the documents (29353).

February 16, 1962 — The prosecution served a list of 44 other categories of documents which were not to be turned over unless the defendants made as then specified concessions (29353, 28442). These were the truly meaningful documents secured from various third parties.

February 16-19, 1962 — Defense counsel looked at documents in the 68 categories and discovered that they were in cartons in two rooms; less than 1% of these documents had ever been seen by Mr. Dardi's counsel before; most had been in the possession of the SEC and the prosecution for years (29377-415). It took one defendant, attorney Swann, 12 to 13 hours to examine *part* of the *first* category offered (29377).

February 19, 1962 — A second pre-trial conference was held (29354-55).

The prosecution offered only one stipulation directed at the 44 categories of documents which (a) required defendants to sign before they saw the documents; (b) set no time for the production of documents; (c)

did not contain any specific enumeration of documents but related back to the 44 categories; and (d) was incomprehensible. (See stipulation placed in record in Court of Appeals by consent.)

Defendants negotiated in good faith all day, but could not agree to the stipulation offered by the prosecution.

No adjournment in the trial would be allowed to see any documents.

February 21, 1962 — The prosecution pre-marked 800 exhibits with sub-exhibits; defense counsel were not allowed to see exhibits—contrary to the expectation of the Chief Judge—and were shunted to the rear of the courtroom during the marking (2935?).

February 26, 1962 — All defense counsel moved to adjourn the case so (a) they could look at the documents in the 68 categories; (b) work out further discovery if possible; (c) have time to prepare their case. *The motion was denied on the ground that counsel could prepare as they went along* (2854, 2936? *et seq.*).

February 27, 1962 — The case began.

The Court of Appeals has justified the District Court's actions by saying that appellants "were adequately informed of the charges against them" by means of the indictment that was filed in July of 1961 and an 8-page bill

of particulars voluntarily served on February 8, 1962.* It further noted that the "denial did not cut off the defense from information. On February 8, 1964, the Government served an eight-page bill of particulars and offered to make available some sixty-eight categories of documents." The Court of Appeals noted that there were opportunities for further preparation during the inordinate length of the trial and adjournments that occurred early in the testimony (1286). Then for the Court of Appeals "[l]astly and most determinative [was] the fact that [Mr. Dardi] makes no showing on this appeal that the facts would have been other or different had he had an additional year or six months in which to prepare. Nor does he point even now to any facts which could have been developed which would have so radically changed the fact picture that, in effect, a new trial should be granted" (330 F. 2d at pp. 328-29).

All of this was offered by the Court of Appeals not only in justification of the complete denial of pretrial testimony but in justification of the statement made by the trial court that counsel could "prepare as the case went along" (9409-10).

But the facts do not justify what the District Court did. Contrary to the Court of Appeals' statement, the issue is not whether defense counsel "approached the day of trial

* In its brief to the Court of Appeals, the prosecution justified all this by challenging the good faith of defense counsel—the so-called subjective criterion that supposedly arises from the *Borman Dairy Co.* decision of this Court. See *United States* v. *Iozia*, *supra*. As evidence, it stated that "for years" counsel for Mr. Dardi could have looked at the testimony of Mr. Dardi under the SEC rules. It did not mention that defense counsel did go to the SEC's office before trial to look at testimony; but they were prohibited from taking any notes (27146, 29414-16). That rule was only changed for them 8 days before trial after complaints to the trial court (29211, 29214-17, 29420, 29345 *et seq.*).

*completely* unprepared." And the trial court did "callously" tell them to "prepare as they went along". The sum of what the trial court did was to allow the prosecution to violate the rule of fairness "developing in the Federal courts" of which it spoke itself (29394). Apart from any discretionary power under any rules, there is a recognized "interstitial" rule that no defendant shall go into a case unreasonably unprepared; there is a rule of fairness that requires counsel not to have to prepare complicated cases with thousands of documents on an *ad hoc* basis leading to "goes and long stops"; there is a requirement to forego the "sporting theory" of a lawsuit, where the cards are all in the possession of the prosecution, for a concept of justice. See *United States* v. *Duncan, supra; United States* v. *Tellier, supra;* Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1119-21 (1957); Note, 67 HARV. L. REV. 492, 495 (1954); *Developments-Discovery*, 74 HARV. L. REV. 940, 1059 (1961). When, as here, the facts cried out and the "sporting theory" was carried out to its ultimate, the denial of reasonable inspection and sufficient time to look at what was offered to prepare for trial amounts to a lack of "due process" and the denial of the right to have effective counsel in violation of the Fifth Amendment to the Federal Constitution. See *Application of Tune*, 230 F. 2d 883 (3d Cir. 1956), favorably commented on in *Ciccnia* v. *LaGay*, 357 U. S. 504, 511 (1958).

Apart from the incorrectness of the result factually, the decision of the Court of Appeals in this case stands for rules of the law that this Court should not leave intact. This is the leading case in the Second Circuit since the happier decision of *United States* v. *O'Connor, supra*, where the actions of the District Court concerning pretrial discovery in a criminal case have been challenged and commented

upon at length. Now the Circuit Court's multi-pronged rationale puts an abrupt end to the flow of decisions in the district courts that recognized the need for full documentary discovery in involved financial criminal cases. We submit that at every juncture the Court of Appeals' decision has set the clock back a decade or two, and set a precedent for abuse of discretionary powers under Rules 16 and 17(c) of the Federal Rules of Criminal Procedure, if not for violations of fundamental rights.

First, the Court of Appeals confuses the notion of notice of charges with discovery and production of documents to meet those charges under the *Bowman Dairy* case. Even if we were to assume that the indictment and the eight-page bill of particulars did give the defense proper notice of the kind of evidence that might come into the record the issue in these complex cases is not notice, but the affording of opportunity to meet the noticed charges by looking and discovering the records that were concededly relevant—the undifferentiated volumes of documents in the 68 categories, the more crucial documents lying in the 44 categories that were never truly offered and some of those first 800 exhibits.

Second, the issue certainly should never be whether counsel approaching the day of trial were "completely unprepared". The issue should be, and always was under the rule of the *Bowman Dairy Co.* case, whether they are sufficiently prepared by way of seeing documents to meet the charges against their clients and have their opportunity to discover useful documents. See cases cited *passim*.

Third, the Court of Appeals misfocuses the issue by emphasizing that counsel had "many opportunities for further preparation" during the course of the trial. The truly significant documents in this case were contained in 44 categories of document, which were never offered for view to the defendants, and the other documents falling into

categories delineated in the pretrial motions of the defendants and were never offered for view. As it did no good less than 12 days before trial to have an offer to comb through a roomful and more of complicated brokerage records—all of which the prosecution claimed were relevant in some way, but most of which were never offered in evidence (28456)—so it did no good to have weeks of adjournments during trial to see *no* records at all.

Fourth, the trial court's unfortunate "prepare as you go" view led to delays, months of delays. Because of it Mr. Dardi's counsel accepted the trial court's proposal to work on an abbreviated schedule (5611-13, 7383, 7400); defense counsel were embarrassed all through the trial into reading newly-seen documents on short notice in front of the jury and to cross examine under pressure, and the theory in practice led to long hours of work at night after the strain of all-day trial (*e.g.*, 7380-81, 7595, 9354, 15496, 18315-16). See 5 *Wigmore, Evidence* §1367-94 (3d Ed. 1940). The theory laid the bedrock for the road to eleven months and one week of trial, which itself was an abomination and should have required reversal below. The Court of Appeals ignored the obvious wrong and rather used the length of trial to excuse the lack of proper pretrial discovery—a curious rule to give the district courts.

Fifth, the Court of Appeals' rule that Mr. Dardi would have to show some radical factual change to prove that he was prejudiced on his appeal is tantamount to saying that at no time will a defendant secure reversible error as a result of denials of pretrial discovery in these most complicated financial cases. How can any counsel show anything from documents that are not seen before or during trial, unless miraculously or by some good fortune the documents fall into his hands after trial? See *United States* v. *Consolidated Laundry Corp.*, 291 F. 2d 563 (2d Cir. 1961).

How can appellate counsel know what trial counsel would have unearthed or how he might have used unseen specific documents? All the tools to prepare for this involved case lay with the prosecution; most of them still lie there.

**2**

**The Court of Appeals for the Second Circuit refused to draw the proper conclusion from the fact that the case was unnecessarily protracted by colloquy and acknowledged frightful wastes of time; as a result the Court's opinion stands for the proposition that an unnecessarily long trial does not make for reversible error even when there are actual incidents showing that the jury was disturbed by the length of trial and defendants prejudiced as a result.**

The Court of Appeals stated that long cases do not *per se* make for reversible error (330 F. 2d at p. 529) and, at first, indicated that this case was long because of (i) the nature of the law of conspiracy, about which it could do nothing, (ii) the necessary joinder of many defendants, and (iii) the complicated financial transactions involved (*ibid.*).

We recognize that sometimes long trials are an unavoidable evil. If that were all that were to this case and to the Court of Appeals' decision in this case, we would not urge this Court to review this case on the question of the length of trial.

But the fact is, as later made plain by the Court of Appeals, that this was not a case that was lengthened by natural causes. Nor is this a case—again made plain by the Court of Appeals—where we need speculate on the jury resentment of the inordinate length of the trial (*ibid.*).

Under the Court of Appeals' discussion of "colloquy", the Court of Appeals lays bare the fact that this case was too long from *unnatural* causes by at least five and a half months (*ibid.*). Based on the calculations made by the prosecution in its main brief to the Court of Appeals (pp. 143-44), this trial should have taken no more than two and a half months. Originally, the prosecution had estimated that the trial would take from six to eight weeks. The Court of Appeals concludes that "a tighter reign" by the trial court would have resulted in a materially shorter trial (330 F. 2d at p. 330).

We look briefly at some statistics placed in the record by the trial court. It noted that, as of October 31, 1962, there were 18,894 pages in the record. Of this, it observed that there are only 10,489 pages containing testimony of which 9,597 related to the case-in-chief; 892 pages related to testimony concerning the "Jencks Act and other proceedings". Colloquy consumed 8,405 pages.

It also found that there were 150 days in which court sessions, of some kind, were held; there were 23 normal working days in which no court sessions at all were had. There were 18 court days on which the court adjourned near or before 1:30 p.m. (19228-29a).

Later, the trial court placed in the long record more statistics. As of November 7th, 82 witnesses had been called; the trial record contained 9,814 pages which recorded testimony, but some 892 pages were devoted to ancillary matters, such as Jencks Act proceedings. Colloquy took up 8,838 pages (19734-35). Still later, the trial court placed more statistics in the record. It noted that as of November 15, 1962, there were 20,224 pages in the record; there were 1,067 prosecution exhibits marked, exclusive of subsidiary exhibits, and defendants' exhibits numbered up to 258 (20225-26).

The trial court's statistics, which do not cover the last three months of trial, credit too much to the amount of pages that were devoted to taking testimony of some kind. Apparently, it considered many pages as "testimony" although there were some colloquy and objections on them. The trial court's statistics did not give full significance to the number of days or parts of days that were "lost"; for it failed to take into consideration the many times that the court adjourned (i) early for the day, between 1:30 and closing time; (ii) started late; (iii) did not get into session after lunch or after a recess until well past the time set; or (iv) a combination of them.

The pattern of testimony-taking matched against colloquy and trial against delay sharpened after the court's observations. It reached the ultimate on Mr. Dardi's case as the court spent days requiring that defendants make "offers of proof" at the instance of the prosecution. Mr. Dardi's case was on from November 9 (19742) to December 18, 1962 (22752). Within the five weeks of Mr. Dardi's case, only 1,500 pages contained testimony, with some of it, of course, broken up by objections and minor colloquy. Over 1,200 pages of colloquy were recorded; something like 250 pages in addition were devoted to the trial court alone addressing itself to its problems and the reasons why things were done or not done by it (*e.g.*, 20426-31, 20801-27). In addition, there was some off-the-record discussion. In the time period, there were only 10 days where there was any substantial testimony taken, some six days where the proportion of colloquy to testimony ran about 50-50; and some 7 full days taken up with nothing but colloquy.

A final evaluation of the ratio of colloquy to trial testimony must consider one more factor: the off-the-record discussions, which from all hints on the record might have added five to six thousand pages on the colloquy "side"

(*e.g.*, 7052, 722a, 769, 1234, 1267, 1268, 1269, 1284, 1429, 1462, 1469, 1585, 1947, 1969, 1974, 2042, 2534, 2542, 2544, 2668, 3019, 3460, 3596, 3597, 3600, 3606, 3623, 4076, 4199).

Some measure of the malfunctioning of the trial is [illegible] by placing this pattern of colloquy, trial court soliloquy, and early dismissals and late beginnings in the context of the trial court's schedule. From the beginning of the trial to May 24, 1962, the jury was supposed to sit from 10:30 a.m. to 1 p.m. and then 2:15 p.m. to 4:30 p.m. Beginning on May 24, 1962 and ending on June 21, 1962, the jury was supposed to sit to hear evidence from 10 a.m. to 2 p.m. with a "twenty-minute" coffee break, which nearly always ran over. On June 21, 1962, after the jury requested a more extended day, the closing hour was supposed to be 3 p.m. (7399-400).

The jury never sat at night and seems to have sat beyond the closing hour for an extended time only once. That was for forty minutes (18272).

Using the trial court's statistics, we estimate that after the testimony began in the case, there was an average of one-and-a half hours' testimony taken a day including testimony in ancillary proceedings and not counting the interruptions caused by minor colloquy and thousands of objections.

This concededly short schedule and the many delays caused by "unavoidable" incidents such as a juror's illness might not have been so bad and might have helped counsel in view of the lack of pre-trial disclosures if only the time that was not being spent before the jury were free or put to some good office. There were many good uses that could have been made of that time. *See Handbook of Recommended Procedures for Protracted Cases*, 25 F. R. D. 351 (1960). We suggest that, perhaps, the pre-marked

exhibits or any documents of true substance might have been turned over in advance; Jencks Act material for witnesses might have been given in advance; examinations under the Jencks Act might have been taken for groups of witnesses without extended colloquy; or counsel might have been allowed to go to their offices to prepare for their cross-examination or to prepare to meet issues not mentioned in the pleadings. But the statistics tell the story. This case was "colloquized", with the aid of no pre-trial discovery whatsoever, from the estimated six weeks to eight weeks to eleven months and one week. The Court of Appeals noted that the jury was subjected to four months of enforced attendance at a debating contest (330 F. 2d at p. 330).

The Court of Appeals, however, was kind to the trial court. It placed the blame "if blame there be" in equal parts upon the court and all counsel. But the Court of Appeals did not recognize what the trial court itself recognized: the responsibility for what happened rested with the trial court, the one person in the courtroom who could control colloquy.

The trial court was aware that it had the responsibility to "speed up" the trial and once threatened to "sit late at night and start early in the morning" (1337). The trial court recognized that control of colloquy was its responsibility (*e.g.*, 3587). It also recognized that the attorneys on *both* sides were under duty to protect their clients' interests and that duty was to argue every point of evidence that they felt the court would hear when they sought either to exclude evidence or have evidence admitted (21827).

The trial court also realized from time to time that something was amiss, sometimes feeling that it could do something about it and at other times feeling that the

situation was beyond control. For example, when the trial was some weeks afoot, it said:

> "I am very anxious to speed up this trial, though I must admit my hopes have been dashed time and again by unavoidably protracted colloquy, arguments, etc. and that is not said by way of criticism of anybody" (2011-11a).

Many months later the trial court was to observe:

> "We are losing so much time and have lost so much time with arguments and colloquy that the whole momentum of the case is being de-accelerated. I feel that with the short schedule that we have, the fact that there are these ostensibly unavoidable colloquies, sidebar conferences and arguments and now particularly, with a reduced reservoir of jurors time is really becoming of the essence" (15208-09).

The court, of course, had missed its opportunity at pretrial to speed up the trial. As the statistics and the nature of the colloquy show, it missed its opportunity right along by talking, inviting talk and talking some more. Most significant, most of that talk was totally avoidable—by a proper pretrial disclosure and by simple restraint by the trial court.

The colloquy ranged from discussions of rules of evidence (with copious citations by the trial court) to the campaign duties of Robert Morgenthau, who ran unsuccessfully for the governorship of New York State while this trial lagged on. It included dissertations by the trial court on the law, including some very elemental discussions. Most of the talk was unnecessary in whole; all of it was unnecessary in part. The trial court seemed not to be able to make a ruling on evidence when the prosecution or defense counsel objected

without placing its opinion in the record, sometimes with the avowed view of making it clear to a higher court that it was right and lest a higher court think there was reversible error in the record (*e.g.*, 4913-16, 18886).

There were other reasons for delay, besides colloquy in and of itself; although all of these other facts provoked the colloquy. There were sicknesses that took away weeks of time before the jury; but the longer the trial went, of course, the more sicknesses there would be. Time was wasted during those "incidents," as the prosecution observed, with colloquy (18393). Then there was the lack of pre-trial discovery, with resulting surprises, requests for discovery and subpoenas on the fly (*e.g.*, 959-61, 1601-16, 1803-13, 2012-01, 3964-81, 4184-201, 18,315), and the need to study documents not revealed before or revealed but a short time in advance of an offer (*e.g.*, 1363-72a, 1447-53, 2012-42, 4306-11, 4549-72, 7595, 9354, 15194-97).

The long trial with its avoidable "goes and long stops" was prejudicial to Mr. Darch and the other appellants here, and the trial court was aware that such a trial would be when it denied all pre-trial discovery (29408).

We submit that this case should have been reversed (i) because of that prejudice; and (ii) because the orderly administration of justice in the district courts requires that there ought not to be a precedent on the books like this one, which would be an invitation for complete and arbitrary disregard of sensible procedures in violation of elementary notions of fair play. If this case is not reversed for mismanagement, no case ever will be.

The duty of the jury in this case, even with their attention properly concentrated, was a frightening one. They had to understand complicated SEC laws and regulations; they had to compartmentalize in their minds evidence that

were sometimes binding on one set of defendants and not on others; they had to follow the prosecution through an unnecessarily involved explanation of Bon Ami and the like (but not be blinded by that testimony into not focusing on this case); they had to remember the testimony of scores of witnesses. Such a task required a concentration that is at best "a fiction," one we accept as part of our judicial system with reluctance. See *Krulewitch* v. *United States*, 336 U. S. 440, 453 (1949); *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947); *United States* v. *Crosby*, 294 F. 2d 928 (2d Cir. 1961); *United States* v. *Bufalino*, 285 F. 2d 408, 416 (2d Cir. 1960). That task was complicated even further by instructions that pleas after pleas of guilty by some defendants had to be erased magically from the jurors' minds, by headlines, by statements of a marshal in praise of Guterma and by the avoidable and "unavoidable" incidents that dogged this trial. The jury's task required, at minimum, a concentration of the highest order and by persons of genius calibre.

In this trial that necessary concentration was fractured by colloquy daily and by delays of weeks; it was fractured by the fact that the jury spent more time waiting to hear evidence than it did hearing evidence, by the annoyances of delay and by economic and social pressures. If we must abide by legal fictions, we submit that there must be some semblance of underlying fairness; there must be some basis to say that the "jury's view of the evidence controls." There is none here.

After a time, even for counsel armed with the record, the facts and witnesses become blended as the colloquy intrudes; it is hard even for us to pick out the distinctions made by *Guterma*, for example, among defendants. The jury did not have the written record; for weeks, it lost the thread and daily had to wait to pick up the thread as

they sat in the courthouse. Was it possible for the jury to understand, for example, that Ehrich's testimony given in October and November, 1962, was significantly different from and contradictory to Guterma's given between March and April of 1962? Could the jurors understand that Branfi's testimony, given in August and September, 1962 was inconsistent with the story that Guterma told some 5½ to 6 months earlier?

Beyond the obvious inability of the jury to grasp what was going on with its concentration so fractured is the fact that in this case the jury unquestionably was under strong economic and social pressures to see this case concluded; it was bound to be resentful of delays and so disturbed that its concentration was further disturbed; it was bound to feel that somehow their long stint should result in a verdict against one or more defendants no matter what.

There is no need to guess at all this, as the Court of Appeals pointed out.

The prosecution and the trial court led the jury into thinking this trial would last six weeks to two months, and after that we see in the record unambiguous statements that establish the jury's restlessness. The pressures on the jurors mounted, as this trial took nearly a year out of their lives and as they sat in the box or more often in the jury room waiting instead of tending to their businesses, going on vacations, and fulfilling the social appointments of their daily lives. There is no question that the jury was concerned about this matter of a long-trial-made-longer and the dashing of their expectations. We cite some examples.

On April 10, 1962, an employer of one of the jurors inquired of the trial court how long its employee would be at the work of listening (and not listening) to the case. The trial court estimated that it would take two more months; that was just its estimate (2866).

Guterma was still on the stand on May 2, 1962. During one of the numerous side-bar conferences that marked this "early" stage of the trial, one of the alternate jurors leaned over to the deputy marshal who was taking care of Guterma and asked the deputy marshal how long the case was going to take (4471-73). On May 28, 1962, another juror spoke to the same deputy marshal and told him in an elevator that she was quite "relieved" that Guterma was off the stand (6019-20). All the while and from time to time, the trial court had been apologizing to the jury for the many interruptions (*e.g.*, 7180-81).

And then the court went on its short schedule. This short session, coupled with the continuous "goes and long stops" of the trial, troubled the jury; and the jury on June 21, 1962, made its worries felt. It requested an extra hour a day. The foreman of the jury said to the court:

> "*Your Honor, we have been discussing trying to hasten this case*, and the consensus of opinion among the jurors has been if it is at all possible we can stay until 3:00 o'clock every day, if it is agreeable with everyone." (7398-99; emphasis added.)

The foreman reiterated that the jury had been discussing the matter among themselves and added:

> "My prime concern, your Honor, is the fact that I have to get back to my work as quickly as possible. I am not [*sic*] employed at the moment although I have a leave of absence from my employer for the duration." (7399)

Juror No. 3 voiced his concern:

> "I must return to earn a living for my family, *so these delays will make things worse*. I am very concerned with that." (7399; emphasis added.)

Juror No. 3 asked to be excused and was, but the court told the jury it did not want any mass exodus (7632).

As summer drew near, there was the question of taking a week's vacation. Juror No. 6 had planned a vacation with her family; she had made arrangements to go for a trip to Canada. All counsel seemed to be in agreement that a vacation would be in order; and the court wanted one, too. But the jury was against it; the jury wanted an end of the trial and Juror No. 6 accepted the will of her fellows (7523-24).

Into the summer the trial went. On July 10, 1962, the foreman of the jury informed the court that his employer was asking questions and he was concerned. He asked the court how much longer the case would take. The trial court said at least another month (9202-02a).

On September 13, 1962, it became necessary to excuse Juror No. 2, who was going to be operated on (15198-210).

And all the while the court was aware that the trial had bogged down and time was being "wasted" (9237).

While we feel the inability for concentration is in itself ample prejudice, we do not have to guess who suffered from the resentment at the time wasted. The prosecution made certain of it. The prosecution was well aware that it was important to have the delays shouldered by defendants. In summation, the prosecutor, in the context of commenting on the fact that the prosecution did not call two witnesses, told the jury that the defendants might want delay "for some reason." Here are two excerpts from the summation:

> "Well, the government did not feel it had to bring in Lehrich and spend so much time when his testimony would be merely cumulative, and the same thing is true of Eveleigh because their strategy was there." (25551)

> "They might want this case to go on and on, for whatever reasons they have, but the government has a duty and the government knew that charges would be made when it decided not to call witnesses, these witnesses being merely cumulative * * * " (25551-52)

And the lack of pre-trial discovery contributed to the jury resentment. The jury watched defendants' counsel pouring over documents, studying them in the courtroom and watched them put their questions and cross examination on documents under pressure (*e.g.*, 7381, 7595, 9354, 15494-96, 18315-16). They had visible evidence of time consumption, but little notion of the court's role in talking and encouraging talk and its duties.

In sum, Mr. Dardi was prejudiced by the unreasonable length of trial caused primarily by colloquy and to some extent the lack of pretrial disclosure of documents. The Court of Appeals' decision constitutes, in its inconsistencies, a sanction in effect of unnecessarily long trials. Under the circumstances, Mr. Dardi was denied the right to due process under the Fifth Amendment and the entire proceedings violated the evolving notion of fair play in the Federal system as laid down by this Court.

## 3

**The restrictions imposed by the trial court on the cross-examination of the witness Lehrich constituted (i) a denial of the right of cross-examination and thus of due process of law and (ii) an abuse of discretion under the federal rule of scope of cross-examination; the Court of Appeals ignored the law of conspiracy that made the "usual" rule of scope of cross-examination inapplicable and has set a seriously erroneous precedent.**

The prosecution chose to name Hyman Lehrich a co-conspirator but not a defendant in the indictment. On its direct case the prosecution offered Lehrich as a witness but "limited" his oral testimony to the highly inflammatory Bender affair (pp. 25, 27-28, *supra*). Then the prosecution argued that defense counsel should not have the right to cross-examine Lehrich on the events occurring in 1955 and 1956 because of the "limited" nature of the direct examination, even though Lehrich testified to a memorandum he had written describing events of United Dye in 1955 and gave it to Bender. The trial court and the Court of Appeals upheld the prosecution on the "federal rule of scope of cross-examination."

We submit that the restriction on cross-examination of Lehrich, the lawyer-architect of the conspiracy, constituted a denial of due process in view of laws of conspiracy. It was, in any case, an abuse of discretion in view of (i) the role played by Lehrich in the events, (ii) Lehrich's statements and actions attributed to him by other witnesses and (iii) the prosecutor's later statements. Lehrich's testimony was cumulative.

Because Lehrich was a co-conspirator, the prosecution, under the rules of law applicable to conspiracy, introduced

extensive evidence of statements made, conversations had, and acts performed by Lehrich in the years 1955 and 1956 through the witness Guterma and others, from which the jury might find a conspiracy. His statements and acts were in the record and they became binding on Mr. Dardi. See *Krulewitch* v. *United States*, 336 U. S. 440 (1949); *Lutwak* v. *United States*, 344 U. S. 604 (1953).

Lehrich's role in the alleged conspiracy was, of course, vital. For example, it was he who told Guterma to reduce his Handridge holdings (818-20); who prepared the alleged false proxy material (*ibid.*); who told Garfield and Pasternak that they would have to reduce their holdings of United Dye below 10% in order to sell the stock obtained from the merger; who arranged for the sale to alleged nominees of 75,000 shares of Handridge (879-80). Lehrich even attended the Guterma-Garfield-Pasternak discussions in Christmas of 1955 (921). And if we are to accept the prosecution's notions and the trial court's charge concerning Bon Ami being an "essential step," Lehrich was there, too; he was escrow agent for Garfield in the loan made by Bon Ami (Gov. Exh. 20; 1439).

Yet, with the witness Lehrich on the stand, the trial court refused to permit defense counsel to cross-examine Lehrich on the statements made by him, the acts performed by him and his conversations with others in the years 1955 and 1956. It and the Court of Appeals ignored the fact that these acts, statements and conversations were already introduced on the prosecution's case. They ignored the charge that was to be given and given that the jury was entitled to use Lehrich's statements and acts to establish the alleged conspiracy and, if the jury found one, were binding for all purposes on those found to be in the conspiracy. *Clune* v. *United States*, 159 U. S. 590, 593 (1895); *Lutwak* v. *United States*, *supra* at p. 617.

It is truly extraordinary that the prosecution could name Lehrich as a co-conspirator and not a defendant, bring before the jury his acts and declarations, put him on the stand, and then successfully object to cross-examination on those very acts and statements. We submit that this was a flat deprivation of the right of cross-examination; it cannot be due process of law; it is a fundamental violation of even the minimal rights of a defendant in a conspiracy case. *Cf. Delli Paoli* v. *United States*, 352 U. S. 232, 239-40 (1957); *Fiswick* v. *United States*, 329 U. S. 211 (1946); *Glasser* v. *United States*, 315 U. S. 60, 74-5 (1942); *Diaz* v. *United States*, 223 U. S. 442, 450-1 (1912); *Delaney* v. *United States*, 263 U. S. 586, 590 (1924); see also *Lutwak* v. *United States*, *supra* at p. 617.

Assuming that there were any discretion in this matter despite the law of conspiracy, we submit that the trial court abused that discretion.

The rule confining the scope of cross-examination in the federal courts to the scope of direct examination is not automatic; it is a discretionary one that must not be abused. See *United States* v. *Minuse*, 142 F. 2d 388 (2d Cir. 1944); *United States* v. *Quinn*, 124 F. 2d 378 (2d Cir. 1941). We submit on its face that no more flagrant abuse could there be than allowing this man, a key figure and a co-conspirator, to escape the stand without being tested in the fire of cross-examination.

Whatever doubt there could be about this—and we can see none—was eliminated when the prosecution time and again told the jury that the testimony of Lehrich in the excluded area would have been cumulative and when the trial court supported the assertion with its charge on "equally available witnesses" (25546, 25548, 2551-52).

We note that the Court of Appeals was mistaken concerning the fact that the trial court said that if Lehrich was called "as part of the defense case, he would be examined on the events of 1955 and 1956 as a hostile witness (330 F. 2d at p. 333)." In point of fact, while the trial court did indicate that it would probably allow Lehrich to be impeached it never said that Lehrich would be considered a "hostile witness" and that it would allow leading questions to be put to him if he was called by the defense (18451, 18619-41). Indeed, the prosecution argued for pages that no such advance ruling could be made and there was a difference between allowing impeaching questions and leading questions (18619-25). The prosecution submitted a ten-page memorandum in support of its position and was successful in keeping the court from ruling that Lehrich would be treated as a hostile witness and leading questions put to him.

We urge this Court, in sum, to hear us on this point and eventually make it clear that the rule of law, under the l. of conspiracy, has to be that a person who takes the stand and has had his statements and actions testified to can be questioned on those statements and actions on cross-examination.

## 4

**As the Court of Appeals recognized, it was error for the prosecutor to state in summation several times that the witness Lehrich and the co-conspirator Eveleigh would have testified cumulatively to Guterma had they been asked proper questions by the prosecution, for, in effect, the prosecutor was testifying to his personal knowledge; but the Court of Appeals set out an erroneous vague rule of reversible error that, we submit, this Court should overturn.**

The prosecution opened its summation by a ten-page recital in which it flatly told the jury that Lehrich and Eveleigh, who were, according to Guterma, chief plotters with him, would have testified cumulatively for the prosecution. According to the prosecution, they would have testified cumulatively on every phase of the prosecution's case, for they were involved in every phase of that case.

What the prosecutor did was error: for the jury could have understood it only to have come from the personal knowledge of the prosecutor from government reports and from Lehrich's grand jury testimony. The Court of Appeals recognized that the prosecutor erred and that the comments of some counsel—not Mr. Dardi's counsel—provided no excuse.

The Court of Appeals justified its finding on a strange and blanket statement: "However, here the jury had adequate affirmative testimony to support its verdicts and the prosecutor's comments under the circumstances do not constitute reversible error (330 F. 2d at p. 334)."

First, we shall show that the Court of Appeals was right in its view that the prosecutor had committed an error—an affirmative and deliberate error.

Second, we shall show that the error was prejudicial and that the Court of Appeals was wrong in establishing its blanket rule on reversible error when dealing with affirmative misconduct.

Lehrich and Eveleigh were named as co-conspirators in the indictment but not made defendants. If the testimony of Guterma is to be believed, they were in the heart of the conspiracy (or conspiracies), with Lehrich as the legal architect.

Lehrich was called as a witness by the prosecution to testify on the Bender episode and that alone; Eveleigh was not called at all. Most of the other central figures never testified: Garfield, Pasternak, Roen and Swann.

The prosecution was not unaware that the jury might wonder why some of the key figures to the alleged conspiracy, who were available to the prosecution, were not called to testify. Defense counsel in their summation alluded to the prosecutor's failure to call some witnesses. In attempting to extricate the prosecution from the problem, the prosecutor violated basic obligations of fairness.

The prosecutor, not without reason, focused his argument with respect to calling *missing* witnesses on Lehrich (25546). The prosecutor set out to tell in every way he could that not only was there no inference to be drawn against the prosecution, but that Lehrich and also Eveleigh would in fact corroborate Guterma and give cumulative evidence.

First, the prosecutor did it by deliberately misstating the defense arguments about missing witnesses. After referring to one defense counsel's comments on the prosecution's failure to call Lehrich and Eveleigh, the prosecutor said (25546):

> "Based on that [counsel's argument], therefore, if the government called them it would be merely corroborative, merely cumulative."

The prosecutor knew that defense counsel were not claiming that the missing witnesses would corroborate the prosecutor's case. Indeed, the prosecutor was to say so a few minutes later.

Immediately, the prosecutor incorporated a flat statement that Lehrich would corroborate Gutenma in a so-called "rule of law." This is the prosecutor's extraordinary statement (25546).

> "There is a rule of law which I believe His Honor will instruct you on because it is the law of this Circuit, that if a witness is available to both sides *and his testimony is merely basically cumulative* then there is no inference to be obtained from *the fact that the party for whom his testimony would be merely cumulative* was not called by him." (25546, emphasis added.)

Next, the prosecutor misstated an argument of Mr. Dardi's counsel about Lehrich, so that he could answer, "It would be cumulative" (25548).

Then, the prosecutor left no doubt as to his meaning. He left no doubt that he was saying *he knew* what Lehrich and Eveleigh would testify to (25551):

> "Well, the government did not feel it had to bring in Lehrich and spend so much time when *his testimony would be merely cumulative*, and the same thing is true of Eveleigh because their strategy was there." (Emphasis added.)

So that its impact would not be lost, the prosecutor went to the point two more times. He stated (25551-52):

"They might want this case to go on and on, for whatever reasons they have, but the government has a duty and the government knew that charges would be made when it decided not to call witnesses, *these witnesses being merely cumulative* * * *.

"It is my duty, the government's duty, to present as much evidence as is necessary to decide the case without spending time on *cumulative evidence* which is available to defense counsel if they want to bring it in." (Emphasis added.)

The gist of the prosecutor's "testimony" that Lehrich and Eveleigh would corroborate the prosecution's case was a representation that he had personal knowledge that they would. This was all the jury could think.

As to Lehrich, there was dramatic evidence that it had to be the prosecutor's knowledge that was the source of the divination that Lehrich's testimony would in fact be cumulative. Lehrich had testified repeatedly that he had been interviewed by the prosecutor in the case and many other Government agents more than "a dozen times" (18470-71, 19041-43). Moreover, the jury knew that he had testified before grand juries (19183, 19187). Thus, the jury would understand that the prosecutor's statements about corroboration were not only based on his personal knowledge of the facts but on Lehrich's numerous statements to Government officials and testimony before one or more grand juries.

The unfairness of it all is reinforced by the fact that the prosecution intentionally limiting Lehrich's evidence to the Bender episode, although it did not hesitate to put many witnesses on the stand to corroborate Guterma and spell out all the intricacies of the most tangential transactions. Then, the prosecutor vigorously and successfully contended out of the presence of the jury that defense coun-

sel should not be permitted to cross examine Lehrich on the facts occurring in 1955 and 1956.

So defendants found the prosecution restricting them from finding out the truth and then heard him tell the jury that this man would give "cumulative" testimony.

A statement of personal knowledge by the prosecutor of a fact on a key witness or witnesses—however entwined in facetious legal arguments—is error. *Berger* v. *United States*, 295 U. S. 78 (1935); *Wagner* v. *United States*, 263 F. 2d 877 (5th Cir. 1959); *People* v. *Tassiello*, 300 N. Y. 425 (1950).

The importance of the "missing" witnesses for the prosecution is acknowledged by the fact that the prosecutor chose to highlight these men, who are at the heart of the conspiracy with Guterma, as the first subject matter of his summation. He deemed this issue of paramount concern.

The Court of Appeals was in its conclusion, and its decision provides no set of criteria for reversible error. It runs away from analysis. When dealing with affirmative misconduct, we submit that this Court ought to require analysis and end blanket assertions—especially current in long trials—of no prejudice because there was sufficient evidence for the jury to find guilt.

When in the area of deliberate actions and misconduct, we urge that this Court say, as is the fact, that no one can evaluate the prejudice arising from the error. When that is wrong then that should be conclusive of the significance of the error. This should be the rule of law in order to create affirmative guides and to prevent the callous attitude towards deliberate error that exists in long cases. We urge this Court to exercise the means that it has to prevent prosecutors from violating traditions of fair play

by taking away the fruits of it—without measuring the unmeasurable, the quantum of prejudice. See *Mapp* v. *Ohio*, 367 U. S. 643, 657-69 (1961); *Miller* v. *United States*, 357 U. S. 301, 313 (1958).

5

**The prosecution committed an act of misconduct when it brought a future prosecution witness before a grand jury during the course of the trial for the purpose, at least in part, of trying to gather evidence for use at trial; the Court of Appeals and the District Court erred in applying a subjective test to the conduct of the prosecutor in going beyond the scope of legitimate inquiry and set out a rule that permits prosecutors to aid current prosecutions by misuse of grand jury process.**

In the midst of this trial, the prosecution subpoenaed Alexander Timm, the former personal secretary to Mr. Dardi and an officer and director of United Dye, to appear before the grand jury. The ostensible sole purpose was to give nothing but testimony "in a Grand Jury investigation of a possible conspiracy to obstruct justice in violation of Title 18 United States Code Section 371" (28614).

In fact, as the record will bear out, this procedure was used in part to gather or try to gather valuable evidence and to put pressure on Mr. Timm to give leads and information to the prosecution for use in this trial in violation of the rules of fair play in criminal trials in the federal courts. Mr. Timm testified at Mr. Dardi's trial as a prosecution witness only two weeks after being called before the grand jury and the prosecution did benefit from his testimony.

On May 16, 1962, the prosecutor put a statement on the record concerning his difficulty in obtaining records of Szabo Food Inc., the successor to United Dye, since the trial of the case began.

His story was this: He had a conversation with a Mr. Geraldson, the attorney for Szabo, in New York in the week of May 7th, during which he attempted to resolve difficulties with regard to subpoenaing and identifying the records of United Dye (5354). While in the prosecutor's office, Mr. Geraldson telephoned Mr. Timm in San Francisco, California. "Pursuant to the prosecutor's request", Mr. Geraldson "instructed" Mr. Timm by telephone to come to the prosecutor's office "pursuant to subpoena" covering the corporation, but not on Mr. Timm, and to be in the court house on Friday, May 11, 1963 (5354-55).

The prosecutor said that Mr. Geraldson appeared at the office on Friday, but not Mr. Timm (5355).

The prosecutor then represented:

> "It has subsequently developed that almost immediately after Mr. Geraldson's direction was given to Mr. Timm Mr. Timm spoke on the telephone to the defendant Dardi and Timm made no arrangements to come here on Friday, but then on Saturday the defendant Dardi flew out to California and conferred with Mr. Timm, who is, pursuant to the subpoena served on Szabo, a witness subpoenaed by the Government, and on Monday, Mr. Timm finally came to New York" (5355).

There was a sinister implication, but no direct accusation. The prosecutor was then asked whether he knew what Mr. Dardi had said to Mr. Timm, and he replied that he had no *personal* knowledge (5356).

The prosecutor said that he was making this statement in "all candor to the court". The prosecutor said: "I think it should be on the record, and so that no one can claim that the Government is keeping *anything* from the Court or defense counsel in this regard" (5355, emphasis added).

The fact of the matter is that the prosecutor did keep something from the court and from defense counsel: He had already, the day before, called Mr. Timm before a grand jury (28620, 5409-10).

Defense counsel investigated and discovered that Mr. Timm had been called before a grand jury (5408-09). Mr. Dardi's counsel made a motion for a mistrial and asked that all leads and evidence obtained from Mr. Timm be suppressed (5415-18). Mr. Dardi's counsel filed an affidavit of Mr. Timm in support of the motion (28620-21).

In the affidavit Mr. Timm stated that on May 15, 1962, he appeared in the court house and was told to accompany the prosecutor here to the grand jury then sitting on the 14th floor. He was called and testified before the grand jury. According to his recollection he testified to the following subjects among other subjects that could have nothing to do with a possible obstruction of justice since the trial began:

> (1) identification of purported telephone transcripts to which one Fabian Mayers, a co-conspirator in the case, was allegedly a party [Fabian Mayers was supposedly involved with Mr. Dardi and Brann in 1956]; (2) the purported passing of messages dealing with the transfer of funds to banks for the accounts of Louis Levin [Guterma's emissary to Brann in 1956] or Brann; (3) the relationship between United Dye and/or Mr. Dardi to Brann with respect to telephone

calls and transfers of money; (4) the relationship of United Dye and/or Mr. Dardi to Louis Levin with respect to telephone calls and bank accounts; and (5) the relationship of United Dye and/or Mr. Dardi to Fabian Mayers and the opening of bank accounts and telephone calls (28620-21).

The prosecutor filed an affidavit in opposition and admitted that Mr. Timm appeared in the prosecutor's office on Tuesday, May 15, 1962. He repeated the story he had told at first to the court, but added the fact that he had called Mr. Timm before a grand jury. He went into the story about Mr. Geraldson's "instructions" to Mr. Timm (28614-15). He claimed that he called Mr. Timm solely as a witness in an investigation of possible obstruction of justice (28614-16).

Then the prosecutor concluded that all the questions posed to Mr. Timm were framed with the grand jury investigation in mind:

> "Based upon these facts and the attitude then shown by Mr. Timm, the government concluded that the Grand Jury investigation was warranted. All questions posed to him during his Grand Jury appearance were framed with this purpose in mind." (28616, emphasis added.)

Mr. Timm was apparently the sole witness called before the grand jury (which was a regular and not a special panel) in connection with its "investigation."

The trial court read the grand jury minutes, and then denied the motion of Mr. Dardi's counsel. The court dictated into the record its decision and its reasons (7229-36). In denying this motion, the court found that the prosecutor acted in "good faith and propriety" and found that the "dominant purpose" of the prosecution was legitimate.

However, the trial court's findings with respect to the contents of the minutes establishes impermissible conduct of the prosecutor. The court found that the 44-page transcript of testimony contained 300 questions and answers. Out of that total, 36 questions pertain to Fabian Mayers, 5 pertain to defendant Brann and 4 pertain to Louis Levin. "These 45 questions," according to the court, "do not seem, at least on their face to have any relationship to the question of compliance with subpoena duces tecum and the production of records of United Dye and Chemical Corporation" (7231).

The court found that the remaining questions represented "*in their aggregate*" an inquiry into the circumstances surrounding the ostensible obstruction-of-justice purpose of the *ad hoc* grand jury investigation (7231) (implying, perhaps, that there were other questions, in addition to the 45, that likewise seemed irrelevant, except when taken in the over-all context of the inquiry).

The court made no finding as to the number of pages covered by answers to the 45 questions beyond the scope of the investigation. The Court of Appeals appears not to have read the minutes, but relied solely on the district court's reading.

In any event, the findings by the trial court corroborate the affidavit of Mr. Timm to the effect that, in the course of his appearance before the grand jury, the prosecutor went into facts in aid of his prosecution.

The court concluded, utilizing a percentage analysis, that "85% of the questions put to Timm before the grand jury were relevant to a legitimate inquiry by that inquisitorial body" (7232). But 85% is not "*all*."

It is submitted that the trial court erred, as a matter of law, in denying the motion, in light of its own findings of

fact based upon its examination of the grand jury minutes and the circumstances attending the grand jury investigation.

We recognize that the grand jury is an inquisitorial body with whose investigations the courts are rightly hesitant to interfere; but the courts supervise grand juries and have "inherent power to prevent abuse of [their] process." *In re National Window Glass Workers*, 287 Fed. 219 (N. D. Ohio 1922); *United States* v. *Lipshitz*, 148 F. Supp. 774 (E. D. N. Y. 1957); *In re Black*, 47 F. 2d 542 (2d Cir. 1931) (sanctioning judicial intervention to prevent *in advance* abuse of process in connection with a grand jury inquiry); and all the cases cited by the trial court (72a-73a). It is improper and a violation of a fundamental concept of fairness and our prosecutive system to use a grand jury to prepare a case already pending. *Ibid.* See also *Norcross* v. *United States*, 209 Fed. 13 (9th Cir. 1913).

The district court missed the point when it searched for the dominant purpose or motive of the inquiry. And the Court of Appeals erred when it adopted this subjective test and the district court's findings. The trial court was not dealing with future events but past events. There was no question of looking for the dominant motive in order to see whether there would be a future abuse. There was simply no issue of the court interfering with the function of the grand jury in its *ad hoc* investigation. The issue was: *had* process been abused?

We do not know the actual content of the questions that numbered at least 45, but we do know that they related to facts and persons having key importance to Mr. Dardi in the trial then in progress. Indeed, the very fact that almost four dozen such questions were in fact asked is evidence that the prosecution found it valuable to pursue the lines of inquiry. There is no question that *a* purpose was and

became to have Mr. Timm give testimony helpful to the prosecution. The purpose of the 45 questions, and maybe more, is undeniable. The number of questions is only significant to establish the extent to which the prosecutor abused his power and process.

This Court need not go into a fine examination of the workings of the human mind to reach the conclusion that the conduct was improper or was going to be improper. It is sufficient that here some time during the inquiry *a* purpose to question Mr. Timm before a grand jury was to collect information for the trial. See *United States* v. *O'Connor*, 118 F. Supp. 248 (D. Mass. 1953).

The amount of harm caused the defense by calling Mr. Dardi's close associate can never be known. The prosecution got Mr. Timm to testify; it may have gotten any number of leads. We submit that it is enough that Mr. Timm took the stand and identified documents in aid of the prosecution and there were very fundamental concepts violated. Here an error was committed by conduct which goes to the very roots of our judicial system. Such conduct dictates reversal and a new trial after the suppression of evidence or leads stemming from it. The only means we have to prevent prosecutors from violating our traditions of fair play is to take away the fruits of it; to allow these convictions here to stand is to "encourage disobedience". See *Mapp* v. *Ohio*, *supra*; *Miller* v. *United States*, *supra*. As one Court of Appeals has recently noted, under a different set of facts, but where the same principle was involved:

> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. * * * They * * * do not recognize the use of a grand jury subpoena, a process

of the District Court, as a compulsory administrative process of the United States Attorney's office." *Durbin v. United States*, 221 F. 2d 520, 522 (D. C. Cir. 1954).

The rule of the Court of Appeals of the Second Circuit, on the other hand, if left to stand, means that a prosecutor will be free to call people before grand juries to aid his prosecution so long as he can find an over-all excuse.

## 6

**The decision of the Court of Appeals allowed impeachment of the defense's key witness by a question addressed to a supposed warrant of arrest; but the exception to the usual rule was not safeguarded by the procedures required by *Michelson* v. *United States*, 335 U. S. 469 (1947) and the rule established would permit prosecutors to impeach by questioning on supposed arrests without having documentation of that arrest.**

Mr. Dardi called as his chief witness at trial Mr. Harold McCollom, who crossed the most damaging witness in the case against Mr. Dardi, the renegade defendant Brann. Mr. McCollom contradicted Brann on the accuracy of his facts and testified to Brann's bad reputation (see pp. 29-30, *supra*).

The District Court allowed the prosecutor to put a question that ordinarily is improper. The prosecutor asked Mr. McCollom whether there was a warrant for his arrest outstanding in Switzerland for embezzling of $50,000 (19977). The prosecutor claimed that this was a lead-in question to establish that Mr. McCollom was biased against Brann; for the prosecution claimed that it wished to show, through the witness, that Brann had been instrumental in getting the supposed warrant of arrest (19979-80). On several oc-

casions, defendants' counsel asked the trial court to direct the prosecutor to show some basis—even a telegram or a letter from the Swiss police—to back this claim. The trial court refused to require the prosecutor to show any documentary evidence or even to state orally his basis for his question; and to this day, we do not know whether there was any such basis (20044, 20046, 20047, 20055, 20065).

Our challenge in the Court of Appeals was not what that court's decision claimed it to be. We are not concerned with the fancied relevance of the supposed arrest. We were disturbed in the Court of Appeals, as was counsel in the District Court, over the fact that there is not a scrap of documentation to support the claim that there was a warrant of arrest outstanding against Mr. McCollom. We are disturbed that the prosecution in this case did not come forward with documentation.

This Court in *Michelson* v. *United States*, 335 U. S. 469 (1947) has laid down a method to handle impeachment by the supposed existence of an arrest record—lest "a groundless question" should "waft an unwarranted innuendo into the jury box." This Court adopted Professor Wigmore's requirement that there be (i) an offer of proof out of the hearing of the jury and (ii) the submission of documentary evidence of the supposed arrest. 335 U. S. at p. 481 n. Not to follow this procedure is error. See *Enriquez* v. *United States*, 293 F. 2d 788, 795 (9th Cir. 1961); see also *Clainos* v. *United States*, 163 F. 2d 593, 596 (D. C. Cir. 1947).

The Court of Appeals excused the prosecutor's conduct on the theory that the question was relevant to the witness' credibility by showing his hostility and bias (330 F. 2d at p. 336). We do not understand how the relevancy of the possible answer would take the arrest question here out

of the *Michelson* safeguards against unverified references to an arrest record. It would seem that the Court of Appeals is saying that the procedure of the *Michelson* case is confined to the specific setting of impeaching character witnesses. But it gives no reason why this should be.

We submit there is no reason: an unwarranted inference against the chief witness of a defendant, particularly when the defendant does not take the stand, can be crippling. It was here.

But again, in this case, the Court of Appeals swept aside, without analysis, the question of prejudice. In point of fact, the Court of Appeals' view that "it was not so prejudicial as to require reversal" runs contrary to the trial court's view of the importance of Mr. McCollom and this incident, which occurred near the end of the long trial and was one of the freshest events for the jury to consider. Here is what the trial court, which presided over the 49-week trial, said in connection with the incident:

> "The Court: Well, in view of the importance of this matter, and I recall the mistrial that was tried by Mr. Justice Pecora in the State Supreme Court on the first Jimmy Hines trial, I think that we ought to move very carefully in this particular area.
>
> "Mr. Walpin [the prosecutor]: Yes, your Honor."

A few pages earlier during colloquy about impeaching Brann by showing his reputation for truth and veracity, the trial court recognized the importance of Mr. McCollom and his testimony to the defense:

> "Now, in view of the fact that Mr. Walpin says that he has not had an opportunity to look into this, and in

view of the fact that I would like to read these authorities, and since this is a very important matter so far as the defense is concerned, *because Mr. McCollom has given important testimony for the defense, and in view of the fact that Brann gave very damaging testimony so far as Dardi is concerned, if Brann were to be believed*, I believe it is sufficiently important to the defense that before I rule on this question one way or the other, that the Court should have an opportunity to formulate its own opinion after reading [Mr. Dardi's trial counsel's] brief more carefully." (1953, emphasis added.)

We urge that this Court hear this case on this point—again to put an end to unanalyzed statements of "no prejudice" which are now the mode in large cases. We again urge that this Court recognize a difference between deliberate acts of the prosecution that are error and those that might stem from neglect or accident.

## CONCLUSION

**For the reasons stated above, and particularly since this case presents questions vital to the proper administration of federal criminal justice which should be settled by this Court, this petition for writ of certiorari should be granted.**

Dated: New York, New York
June 8, 1964

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